



Citation: *NN v Canada Employment Insurance Commission*, 2022 SST 1070

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: N. N.
Representative: L. O.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (462277) dated March 9, 2022
(issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference
Hearing date: August 25, 2022
Hearing participant: Appellant
Decision date: August 31, 2022
File number: GE-22-1249

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost her job because of misconduct (in other words, because she did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] N. N. is the Claimant in this case. She worked as a care aide in a senior's care home. The employer put the Claimant on an unpaid leave of absence for a short period and dismissed. The Claimant then applied for EI benefits.²

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she lost her employment due to her own misconduct.³ They say that she did not comply with the Provincial Health Officer's (PHO) vaccine order (order) at work.⁴

[5] The Claimant disagrees because vaccination for covid19 was not a condition of her employment.⁵ She also has medical concerns about the covid19 vaccination and the employer's policy violates her sincerely held religious beliefs.

Matters I have to consider first

The Claimant sent in some documents after the hearing

[6] At the hearing, the Claimant testified that she asked for a religious exemption. She referred to an email that she sent to the province and their response. I asked the Claimant to submit a copy of the exemption request and the response from the employer.

¹ See section 30 and section 31 of the *Employment Insurance Act* (EI Act).

² See application for benefits at GD3-3 to GD3-15.

³ See initial decision at GD3-24 and reconsideration decision at GD3- to GD3-31.

⁴ See record of employment at GD3-16 to GD3-17; also, "PHO" is an Order of the Provincial Health Officer pursuant to Sections 30, 31, 32, 39 (6), 54, 56, 57, 67 (2) and 69 *Public Health Act*, S.B.C. 2008.

⁵ See Claimant's appeal forms at GD2-1 to GD2-8

[7] The Claimant submitted a copy of the email she sent to the province and their response.⁶ She also sent additional web links to various articles that support her position about side effects and adverse events relating to the covid19 vaccine.⁷

[8] I accepted the Claimant's documents because they were relevant and simply restated her position about covid19 vaccine side effects. All of the Claimant's documents were shared with the Commission.⁸

Issue

[9] Was the Claimant suspended and dismissed from her job because of misconduct?

Analysis

[10] Claimants who lose their job because of misconduct or voluntarily leave their employment without just cause are not entitled to receive EI benefits.⁹

[11] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits.¹⁰

[12] Claimants who voluntarily take a period of time from their employment without just cause are not entitled to receive EI benefits.¹¹

[13] To answer the question of whether the Claimant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Claimant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

⁶ See post-hearing documents at GD6-1 to GD6-2.

⁷ See post-hearing documents at GD6-3 to GD6-44.

⁸ A copy of GD6-1 to GD6-44 was sent to the Commission on August 29, 2022.

⁹ Section 30 of the EI Act.

¹⁰ See section 31 of the Act; Unless their period of suspension expires, or they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.

¹¹ See section 32(1) and 32(2) of the *EI Act*; Unless they resume their employment, lose or voluntarily leave their employment, or accumulate enough hours with another employer

Why did the Claimant stop working?

[14] I find that the Claimant was put on a mandatory and unpaid leave of absence for approximately two weeks from October 12, 2021 and then dismissed on October 26, 2021 because she did not comply with the PHO's order at her workplace.

[15] This is consistent with the Claimant's testimony, record of employment and her discussion with the Commission on file.¹²

[16] In my view, the Claimant's mandatory and unpaid leave of absence from October 12, 2021 was similar to a suspension.¹³ It was not taken voluntarily because she did not have a choice. She was told by the employer that she could not return to work or continue working.

[17] I acknowledge that the Claimant was previously put on a leave of absence several months prior to the unpaid leave of absence imposed by the employer on October 12, 2021. The Claimant explained that the previous leave of absence was due to an ongoing investigation at work related to another issue.

[18] The Claimant said that the previous investigation had not concluded before she ended up being dismissed on October 26, 2021. She stated that the reason for her dismissal was because she had not complied with PHO's order.

[19] Accordingly, I accept the Claimant's evidence on this issue and that the real reason for her unpaid leave of absence and dismissal in October 2021 was related to non-compliance with the PHO's order.

¹² See record of employment at GD3-16; supplementary record of claim at GD3-29.

¹³ See section 31 of the EI Act.

What was the employer's policy?

[20] The PHO for the province of British Columbia (BC) imposed an order for "*hospitals and community (health care and other services) covid19 vaccination status information and preventative measures*". A copy of the PHO's order is included in the file.¹⁴

[21] The order identifies that in order to mitigate the risk of transmission of SARS-CoV-2 created by an unvaccinated person, the PHO ordered that as of October 26, 2021, a staff member who was hired before October 26, 2021 must be vaccinated or have an exemption to work.¹⁵ Employees must also provide their employer with proof of vaccination, or an exemption on request from their employer.¹⁶

[22] The order also provides that employees who receive one dose of the vaccine between October 12, 2021 and October 25, 2021 can continue to work, provided that the employee receives a second dose between 28 to 35 days after receiving the first dose.¹⁷

[23] The file also contains a letter from the employer to the Claimant dated October 6, 2021.¹⁸ It says that the Claimant must receive her first covid19 dose by October 11, 2021 and that her second covid19 dose must be received between 28-35 days after the first one in order to remain eligible to work.

Was the PHO's order communicated to the Claimant?

[24] The Claimant testified that she found out about the order in October 2021 because she was already on a leave of absence related to a workplace investigation that was in progress. She remembered receiving a call from the employer (D.) at home,

¹⁴ See PHO order at GD3-32 to GD3-65.

¹⁵ See GD3-47.

¹⁶ See GD3-45.

¹⁷ See GD3-47.

¹⁸ See GD3-20 to GD3-21.

as well as a letter in the mail. She said that the letter arrived later and it said if she was not vaccinated by a certain date, she would be dismissed from her job.

[25] The file shows that the Claimant spoke to the Commission on January 28, 2022.¹⁹ During that discussion, the Claimant said that she was informed of the “policy” on September 3, 2021 and received a warning on October 6, 2021.²⁰ She was warned that if she did not receive her first covid19 vaccine dose by October 11, 2021, she would not be eligible to work on October 12, 2021.

[26] I find it was more likely than not, that the employer communicated with the Claimant on September 3, 2021 and again by the employer on October 6, 2021 when she was warned. I preferred her initial statement to the Commission because it was more detailed than her testimony about this particular issue. This is also consistent with her testimony that she received a call from the employer in October 2021 and a letter shortly thereafter.

What were the consequences of not complying?

[27] The order says that an employer must not permit an unvaccinated staff member to work after October 25, 2021, unless they are exempt or they have receive a first dose of covid19 vaccine by the dates set out in the order.²¹

[28] The employer’s letter to the Claimant dated October 6, 2021 says that if she does not obtain her first covid19 vaccination dose by October 11, 2021, she will not be permitted to work.²² It says that a failure to comply will result in an unpaid leave of absence from October 12, 2021 for two weeks.

[29] The letter also says that if she does not then receive her first dose of covid19 vaccine by October 25, 2021, her employment will be terminated on October 26, 2021.

¹⁹ See GD3-18.

²⁰ See letter from employer dated October 6, 2021 at GD3-20 to GD3-21.

²¹ See GD3-47 to GD3-48.

²² See GD3-20 to GD3-21.

[30] The Claimant testified that she believes the employer put her on an unpaid leave of absence for two weeks and then dismissed her on October 26, 2021. She agreed that she knew she would be dismissed for not complying with the deadline set out.

Is there a reason the Claimant could not comply?

[31] The Claimant testified that she asked her employer for an exemption from the order for medical and religious reasons, but was told that she had to go to the province to make her request. She explained that she had severe allergies and blood pressure issues.

[32] The employer's letter to the Claimant dated October 6, 2021 says that they do not have the authority to consider or respond to a request for an exemption of the PHO's order.²³ They provided an email for the Claimant to send her exemption request to the PHO's office.

[33] The Claimant provided a copy of her email request to the PHO's office on October 18, 2021 and their response on October 19, 2021.²⁴

[34] I reviewed the PHO's response, but it simply says "*please see attached letter regarding your request*".²⁵ So, it was not clear to me whether the Claimant was approved for a medical and/or religious exemption because the attached letter from the PHO's exemption office was not included in this file. However, I note that in a previous discussion with the Commission, the Claimant said that she was not able to get a medical letter from her doctor.²⁶

²³ See letter dated October 6, 2021 at GD3-22.

²⁴ See GD6-1 to GD6-2.

²⁵ See GD6-1.

²⁶ See GD3-18.

Is it misconduct based on the law – the *Employment Insurance Act*?

[35] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.²⁸

[36] The Claimant does not have to have wrongful intent (in other words, she or does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.²⁹

[37] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of suspended or let go because of that.³⁰

[38] The Commission has to prove that the Claimant was suspended and lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant was suspended and lost her job because of misconduct.³¹

[39] I find that the Commission has proven that there was misconduct for the following reasons.

[40] First, I find that the Claimant knew about the order and her obligations to comply. She was aware of the deadline dates to comply, even though she was already on a leave of absence from work. The evidence shows that she spoke to her employer on or around October 6, 2021 and received a letter that outlined what was expected.

[41] Second, I find that the Claimant willfully chose to not to comply with the policy for her own personal reasons. This was a deliberate choice she made. The court has

²⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²⁹ See *Attorney General of Canada v Secours*, A-352-94.

³⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.³²

[42] The Claimant's representative argued that misconduct is improper behaviour and that in this case, the employer changed her employment terms and conditions. I was not persuaded by the submissions because even if the Claimant did not have wrongful intent, it can still be misconduct.³³

[43] Also, I generally accept that the employer can choose to develop and impose policies at the workplace. In this particular case, the PHO's order was legal binding on the employer because of the covid19 pandemic. So, this means that being vaccinated for covid19 became a condition of her employment. The Claimant breached the order and employer's direction when she chose not to comply and that interfered with her ability to carry out her duties at the care home.

[44] I acknowledge that at one point during the hearing, the Claimant said that her employer told her it was "too late". No further information or context was provided. So, it was not clear to me what date she contacted the employer and for what purpose. If she was contacting the employer to advise that she intended to comply with the order, or was now in compliance with the order, this may have been a relevant fact to consider.

[45] Third, I find that the Claimant knew or ought to have known the consequences of not complying would lead to an unpaid leave of absence and dismissal.

[46] The consequences were communicated to her on or around October 6, 2021. She knew that it would result in a two week unpaid leave of absence from October 12, 2021 and dismissal on October 26, 2021. This was outlined in the letter to her.

³² See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

³³ See *Attorney General of Canada v Secours*, A-352-94.

[47] Fourth, I find that the Claimant has not proven she was exempt from the order. I acknowledge that she asked her employer and the PHO's office for an exemption, but she has not proven that her exemption request was approved.

[48] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment must be involuntary.³⁴ In this case, it was not involuntary because it was the Claimant's actions that led to her unpaid leave of absence/suspension and dismissal.

What about the Claimant's other arguments?

[49] At the hearing, the Claimant's son represented her. He raised other arguments to support her position. Some of them included the following:

- a) Vaccination for covid19 was not a condition of her employment
- b) The flu shot was never mandated by the employer
- c) She cannot make an informed medical decision when a medical procedure is mandated
- d) There has not been enough testing for the covid19 vaccine
- e) It is a human rights infringement
- f) She was not accommodated by the employer, or offered alternatives
- g) Some people have been injured by the covid19 vaccine

[50] The court has said that the Tribunal cannot determine whether the dismissal or penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.³⁵ I have already decided that the Claimant's conduct does amount to misconduct based on the EI Act.

³⁴ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

³⁵ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[51] I acknowledge the Claimant's additional arguments, but I do not have the authority to decide them. The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with her particular arguments.

[52] The Claimant said that she is a union member and paid union dues while she working, but she was unable to get the union's help.

Conclusion

[53] The Claimant had a choice and decided not to comply with the policy for personal reasons. This led to an undesirable outcome, a mandatory unpaid leave of absence/ suspension and dismissal.

[54] The Commission has proven that the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[55] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section